IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Revised
Not Restricted
Suitable for Publication

Case No. CR-20-01750
Indictment No. L11794043

DIRECTOR OF PUBLIC PROSECUTIONS

v

CHAU FU

JUDGE:	HIS HONOUR JUDGE TRAPNELL
WHERE HELD:	Melbourne
DATE OF HEARING:	16 April 2021
DATE OF SENTENCE:	6 May 2021
CASE MAY BE CITED AS:	DPP v Fu
MEDIUM NEUTRAL CITATION:	[2021] VCC 533

REASONS FOR SENTENCE

Subject:	CRIMINAL LAW – Sentence
Catchwords:	Sentence – Attempting to obtain a financial advantage by deception – Obtaining a financial advantage by deception – Early pleas of guilty – No prior criminal history – Excellent prospects of rehabilitation – Minimal requirement for specific deterrence – Minimal requirement for protection of the community – Supportive family
Legislation Cited:	*Crimes Act 1958*, ss 82, 321P(1)(a), 321M, *Confiscation Act 1997*, *Sentencing Act 1991* ss 5(2A), 6AAA.
Cases Cited:	*R v Cave* (1988) 32 A Crim R 484, *Tran v The Queen* [2014] VSCA 85, *Boulton v The Queen* (2014) 46 VR 308
Sentence:	Concurrent Community Corrections Orders for three years – $3000 fine – $6000 fine

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APPEARANCES:	Counsel	Solicitors
For the Prosecution	Mr J McCarthy	Ms A Hogan, Solicitor for Public Prosecutions

For the Accused	Ms K N Phair	Dribbin & Brown Criminal Lawyers

HIS HONOUR:

1 Chau Fu, you have pleaded guilty to an indictment containing one charge of attempting to obtain a financial advantage by deception[1] (Charge 1) and one charge of obtaining a financial advantage by deception[2] (Charge 2).

2 The maximum penalty for attempting to obtain a financial advantage by deception is 5 years' imprisonment or 600 penalty units.[3] The maximum penalty for obtaining a financial advantage by deception is 10 years' imprisonment or 1200 penalty units.[4]

3 The Facts

4 The prosecution filed a summary of prosecution opening dated 24 March 2021 which I have been told by your counsel I can treat as a statement of agreed facts.[5]

5 Background

6 You are the director of a phone repair business called Mr Digital Pty Ltd.

7 The victim in relation to Charge 1 is the Bendigo Bank Ltd (the first victim). The victim in relation to Charge 2 is the National Australia Bank Ltd (the second victim).

8 Charge 1: Attempting to Obtain a Financial Advantage by Deception

9 In August 2018, you and your mother, Oi Kuk Wong, attended a mortgage broker to obtain a loan that would be used to purchase 42 Dodson Road, Officer. You and Ms Wong instructed the mortgage broker the property was to be settled in Ms Wong's name only.

[1]Contrary to ss 321M and 82 of the *Crimes Act 1958*.
[2]Contrary to s 82 of the *Crimes Act 1958*.
[3]Ss 82(1) and 321P(1)(a) of the *Crimes Act 1958*.
[4]S 82(1) of the *Crimes Act 1958*.
[5]Exhibit P1.

10 You provided false information to the mortgage broker. In doing this, you intended to deceive a lender and obtain a bank loan for your mother. On 10 September 2018, you emailed three documents to the mortgage broker that appeared to be payslips issued by Ms Wong's current employer, Mr Digital Pty Ltd. You knew these were false. Your mother was not and never had been employed by Mr Digital Pty Ltd. The mortgage broker used the false information you supplied him with to prepare a loan application to the first victim.

11 Specifically, the applications contained the following false material particulars:

a) Ms Wong had been employed by Mr Digital Pty Ltd as a shop manager since the 1 November 2017.

b) Ms Wong earned a gross monthly income of $7,360.00.

c) Ms Wong was previously employed full-time from 2013 to 2017 as a shop manager by EB International Pty Ltd.

d) Ms Wong had net savings of $95,000.00.

12 Ms Wong signed the application on 14 September 2018 and submitted it to the lender. The total value of the first loan applied for was $412,000.00, along with a credit card with a $2,000.00 limit. Wisely, the first victim did not approve the application for a loan.

13 <u>Charge 2: Obtaining a Financial Advantage by Deception</u>

14 On 14 September 2018, the mortgage broker also applied for a loan from the second victim in Ms Wong's name.

15 The mortgage broker again used false information you provided to him to prepare the application to the second victim.

16 Specifically, the applications contained the following false material particulars:

a) Ms Wong had been employed by Mr Digital Pty Ltd as a full-time shop manager since 1 November 2017.

b) Ms Wong's annual income was $104,552.50.

c) Ms Wong had net savings of $85,000.31.

17 The total amount you obtained from the second victim by your deception was $412,000.00. The funds obtained from the second victim were used to purchase 42 Dodson Road, Officer. The loan would not have been approved but for the false information provided to the second victim.

18 Detection of Offending

19 On 18 August 2019, police executed a search warrant at 42 Dodson Road for an unrelated matter.

20 The prosecution does not allege you are in any way criminally liable for the unrelated matter. However, in the course of investigating the unrelated matter, Detective Senior Constable Butler (D/S/C Butler) discovered:

a) Ms Wong owned the property;

b) A Bendigo Bank mortgage application had been rejected;

c) A subsequent National Australia Bank mortgage application had been approved; and

d) Members of the Victorian Police Criminal Proceeds squad believed false information may have been provided to the banks.

21 After 18 August 2019, D/S/C Butler obtained bank warrants and the first and second victims ultimately provided various documents to Victoria Police confirming the offences had been committed by you.

22 The prosecution does not allege your mother had sufficient knowledge of the

fraudulent aspects of the applications for home loans to prove she committed any offence or was criminally complicit in your offending conduct. Accordingly, she has not been charged with any offence arising from the present matter.

23 Arrest and Interview

24 On 5 May 2020, you voluntarily attended the Knox police station. You were interviewed in relation to the unrelated matter and in relation to the present charges.

25 You made the following admissions during your record of interview:

a)You had organised the home loan for Ms Wong;

b)You went through a broker;

c)The payslips were for applying for the home loan; and

d)You produced the payslips.

26 Victim Impact

27 No victim impact statements were tendered at the plea hearing. So far as the impact of your offending is concerned, I accept no loss was suffered by either of your victims. The first victim did not lend any money to your mother and the second victim received all instalments of interest and principal payable during the term of the loan.

28 Moreover, the loan was secured by a mortgage and there was no real risk the second victim would suffer loss as a consequence of you committing Charge 2. The Officer property was sold by you and the mortgage was paid out in full. The sum of $95,515.07, being the net proceeds of sale, is restrained and liable to automatic forfeiture under the *Confiscation Act 1997*. No application for exclusion has been made to date or, I am told, is likely to be made in the future.

29 Nonetheless, it is to be observed your offending conduct is not victimless. It is serious and had the potential to impact upon the community by way of making it more difficult for borrowers to obtain finance and possibly at a higher cost.[6]

30 Offence Seriousness

31 The offences you have committed are serious, carrying sentences of imprisonment ranging from imprisonment for five years to ten years. In *R v Cave*[7] O'Bryan J commented upon the effects of frauds on finance companies and said:

> 32 Conduct of the kind perpetrated by the applicant is serious and impacts upon the community by way of making it more difficult for persons to obtain finance and possibly at higher cost. It is probably necessary to say through the courts to persons in the financial community and would-be borrowers that an offence of this kind will not be treated leniently by the courts, but may bring, in appropriate circumstances, a sentence of imprisonment.[8]

33 Similarly, in *R v Moss*,[9] Charles JA, in the context of credit card fraud, said:

> 34 The money obtained was substantial, and the sums sought on the housing loans were very large indeed. The learned judge was plainly entitled to give weight to both specific and general deterrence. Banks and other lending institutions have little alternative but to rely to a substantial extent on the truthfulness of statements made in applications for finance, and on the honesty of applicants. Credit and other checks imposed by such institutions to attempt to avoid losses caused by frauds of this kind increase the cost of lending, and are reflected in higher charges made by the institutions and borne by the whole

[6]See *R v Cave* (1988) 32 A Crim R 484, 487 (O'Bryan J. McGarvie J agreeing); *R v Moss* 20/10/1997 (Unreported, Victorian Court of Appeal, Brooking and Charles JJA and Hampel AJA, 20 October 1997).
[7](1988) 32 A Crim R 484.
[8]Ibid 487 (O'Bryan J, McGarvie J agreeing). See also *R v Kostikidis* (Unreported, Supreme Court of Victoria, Court of Appeal, 12 September 1996) 11–12 (Charles JA, Winneke ACJ and Callaway JA agreeing).
[9]Unreported, Victorian Court of Appeal, Brooking and Charles JJA and Hampel AJA, 20 October 1997.

borrowing community. Offences such as here occurred are difficult to detect, expensive to prosecute and prevalent. They are unquestionably serious.[10]

35 Your offending conduct is serious enough, although not as serious as many cases of this type that come before the courts. The prosecutor characterised both offences to 'have a mid-range objective seriousness.'[11] This was largely owing to the significant amount of financial advantage actually obtained or sought to be obtained by you, the premeditation and planning involved and the relative sophistication of the deceptions perpetrated.

36 I accept this is mid-range offending but, in my opinion, it falls at the lower end of that range. No breach of trust was involved, and your moral culpability is lower than many who commit offences of this type, although, it is increased by reason of you persisting with your criminal conduct after the first application for a loan was refused and you had time for calm reflection. However, on the plus side, there was no attempt to conceal the true identity of the borrower and you did not commit the offences for personal financial gain in the usual manner or to support an extravagant lifestyle. The two offences were committed over the relatively short period of 13 days.

37 Ms Phair, who appeared on your behalf, accepted the offending was 'serious'.[12]

38 Clearly, as Ms Phair accepted, denunciation, general deterrence and just punishment must loom large in sentencing you.

39 In light of your lack of any prior criminal history or subsequent offences, together with your cooperation with police and the level of your remorse, I consider I need give very little, if any, weight to specific deterrence and protection of the

[10]Ibid 8–9 (Charles JA, Brooking JA and Hampel AJA agreeing) (citations omitted). See also *R v Patniyot* [2000] VSCA 55 [38] (Charles JA, Winneke P and Callaway JA agreeing); *R v Fernandez* [2006] VSCA 38 [23] (Mandie AJA, Chernov and Eames JJA agreeing).

[11]Prosecution Sentencing Submissions dated 15 April 2021 (Exhibit P2) [3].

[12]See 'Plea Submissions on Behalf of Accused' dated 28 April 2018 [2] (Exhibit D1).

community.

40 I accept you have gained and continue to develop insight into the reasons for your offending on this occasion, you have a good work ethic and you have a supportive family. Accordingly, I consider you have excellent prospects of rehabilitation.

41 **Personal Circumstances**

42 At the time of these offences, you were 34 years old. You are currently 37 years old. You were born in Hong Kong. You are a dual Australian and Hong Kong citizen.

43 You are an only child. Your parents fostered your cousin, Yu Fu following the death of your aunt and uncle in a car accident.

44 You grew up in a poor-to-middle class family with your parents working hard in restaurants to provide a future for you.

45 You completed primary and secondary schooling to the equivalent of Year 10 in Hong Kong. In 2002, when you were 18, you came to Australia on a student visa to study.

46 You undertook an English language course and subsequently commenced an accounting course at Holmesglen TAFE. After 12 months, you transferred to Deakin University to undertake a Diploma of Commerce. However, you struggled with the coursework because of your lack of English language skills and did not complete the diploma.

47 In 2004, you returned to Hong Kong and commenced working in office administration, which you enjoyed. However, you were told without a university degree your prospects for promotion would be limited.

48 Your inability to complete studies in Australia, lack of job prospects in Hong Kong

and sense of inferiority in your workplace resulted in many arguments with your father.

49 You felt inferior and thought your father saw you as a failure and he considered he had wasted a lot of money sending you to Australia to study. You were brought up to believe that success was measured by status and monetary gain and you did not want your wife and children to have to live as frugally as you had done. Your father encouraged you to invest money once it was earned.

50 In 2006, you returned to Australia and completed a Diploma of Cookery. Following completion of that diploma, you enrolled in a Bachelor of Business (Hospitality and Tourism Management) which you successfully completed in July 2009.[13]

51 In 2010, your father flew to Australia to see you graduate and he became unwell. You wanted to take over your father's restaurants. However, your father did not want you to work in restaurants. Your father's illness continued and you returned to Hong Kong to assist your family. Your father died of lung cancer and you stayed in Hong Kong to support your mother and close your family's restaurants.

52 Following your father's death, your mother sold her home in Hong Kong and came to Australia. You sponsored her in 2014 and you continue to sponsor her. The arrangement between you and your mother was that you would ensure your mother's needs were met and you could use her money, which was considered to be 'family money'.

53 In about 2010, you met Puiyu Leung and commenced a relationship. You married Ms Leung in 2013. Ms Leung supported you in court at your plea hearing.

54 You have two children together; a daughter, Mia, born in 2015, and a son,

[13]See letter from Carrick Higher Education dated 24 July 2009 and the attached testamur (Exhibit D2).

Carmelo, born in 2018. Ms Leung is a stay-at-home mother. She is a permanent resident of Australia.

55 In about 2013, you invested in an online business, Nextmart, selling household goods with two friends. You used money from your father's inheritance to invest. Nextmart operates from a 200sqm factory and employs seven full-time staff members. You work in the business daily, both in the warehouse and on marketing the business. You continue to develop relationships with major retailers such as Bunnings, Catch of the Day and Kogan. You do not derive a salary from this business. Rather, you and the two other partners receive profit distribution.

56 In about 2017-2018, you were going to invest further money in Nextmart. However due to business uncertainty at the time, you decided against that and instead used the money, approximately $100,000, to purchase real estate. Your mother had been looking at real estate since her arrival in Australia. You engaged a mortgage broker to facilitate the purchase of the house in Officer, the subject of the present offences.

57 In about 2018, you and Ms Leung started another business, Mr Digital. As you continue to work in Nextmart. Ms Leung and another person, who is her friend, conduct the operations of Mr Digital. The business has suffered greatly owing to the coronavirus pandemic.

58 Mitigating Circumstances

59 You have no prior criminal history and, accordingly, you fall to be sentenced as a person of otherwise prior good character.

60 I also take into account the matters contained in the reference provided by your wife.[14] I accept you are hardworking and a good provider for your family,

[14]Dated 31 March 2021 (Exhibit D3).

including your mother. I also accept you are a loving, caring and supportive husband, father and son.

61 You pleaded guilty to both charges at the earliest forensically reasonable opportunity. You are entitled to have your early pleas taken into account in your favour. They have utilitarian benefit and indicate an acceptance by you of responsibility for your offending conduct and a willingness to facilitate the course of justice.

62 You cooperated with police and made full admissions in your record of interview. On the material before me, I find your pleas of guilty demonstrate true contrition and remorse for your offending conduct.

63 Given you are the main breadwinner for your family, and you support your elderly mother who is not in good health, I accept that if you were imprisoned your concern for them would increase the burden of imprisonment on you. Moreover, your business would fail, causing your employees to lose their employment.

64 The prosecution concede COVID-19 is relevant to sentence because:

65 (a) An offender is a higher risk of contracting COVID–19 if they are incarcerated (presuming an outbreak in custody).[15]

66 (b) The inherent utilitarian value of a guilty plea is greater during the pandemic.[16]

67 (c) The pandemic is causing additional stress and concern for those incarcerated and their families, as it is for every member of the community.[17]

68 (d) The pandemic can impact on visits, work and educational opportunities depending on the number of cases of COVID-19 in the community at any

[15] *The Queen v Madex* [2020] VSC 145 [52].
[16] *DPP v Bourke* [2020] VSC 130 [32].
[17] *Glen Brown v The Queen* [2020] VSCA 60 [48].

given time.

69 However, there is no evidence before me to indicate you will suffer any particular additional custodial hardship over and above that of the average prisoner as a result of COVID–19.

70 As I earlier noted, $95,515.07, being the net sale proceeds of the Officer property, is restrained under the *Confiscation Act 1997*. Your counsel accepts you cannot demonstrate, to the required standard, you lawfully acquired this money and, therefore, I cannot take into account as a mitigating circumstance the almost certain forfeiture of this money.[18] However, I do take into account in your favour the fact you cooperated fully in the processes leading to the forfeiture of this sum.

71 Application of Sentencing Principles

72 I have had regard to current sentencing practices in relation to the charge of attempting to obtain a financial advantage by deception and the charge of obtaining a financial advantage by deception. I was referred to *Marannu v The Queen*.[19] There are a number of differences, but some relevant parallels, between Ms Marannu's situation and yours.[20] I was also referred to *Tran v The Queen*.[21]

73 While these cases provide some assistance, no directly comparable cases are readily identifiable. In any event, it is always difficult to gauge more than a general yardstick from so-called 'comparable cases', given the wide range of offending conduct that can constitute the present offences and the myriad of personal circumstances pertaining to individual offenders.

[18] *Sentencing Act 1991* s 5(2A).
[19] [2011] VSCA 105.
[20] Ibid [4]–[13] (Ashley JA, Weinberg JA agreeing).
[21] [2014] VSCA 85.

74 The basic purposes for which a court may impose a sentence are just punishment, deterrence, both specific and general, rehabilitation, denunciation and protection of the community. In sentencing you, I must have regard to a range of factors, such as the seriousness of the offences, your culpability for them, the impact on any victim and your personal circumstances.

75 I am required to balance the interests of the community in denouncing criminal conduct with the interests of the community in seeking to ensure that, so far as is possible, you are rehabilitated and reintegrated into society.

76 General deterrence, denunciation and just punishment are very important sentencing considerations for these offences. I am of the view in your case specific deterrence and protection of the community need be given very little, if any, weight. I assess you as having excellent prospects of rehabilitation.

77 Your counsel submitted that the imposition of a community correction order (CCO) with strict conditions would achieve all the purposes of sentencing in this case. I had you assessed for suitability for a CCO and received an Assessment Outcome Report dated 20 April 2021.[22]

78 You have been assessed as suitable for a CCO with an unpaid community work condition attached.[23] You were assessed as having a low risk of reoffending according to the Level of Service Risk Assessment Tool, and accordingly no other program or treatment conditions were recommended.

79 Additionally, your counsel advised me you have the capacity to pay a 'significant' fine.

80 As the Victoria Court of Appeal observed in *Boulton v The Queen*:[24]

[22]Exhibit C1.
[23]*Sentencing Act 1991* s 48C.
[24](2014) 46 VR 308.

> It follows from what we have said that a CCO may be suitable even in cases of relatively serious offences which might previously have attracted a medium term of imprisonment (such as, for example, aggravated burglary, intentionally causing serious injury, some forms of sexual offences involving minors, some kinds of rape and some categories of homicide). The sentencing judge may find that, in view of the objective gravity of the conduct and the personal circumstances of the offender, a properly-conditioned CCO of lengthy duration is capable of satisfying the requirements of proportionality, parsimony and just punishment, while affording the best prospects for rehabilitation.[25]

81 After balancing all relevant sentencing considerations in your case, I consider sentences imposing substantial fines combined with a three-year CCO[26] with 600 hours of unpaid community work is appropriate to achieve the purposes for which the sentences are imposed.[27]

82 Stand up Mr Fu

83 On Charge 1 (attempting to obtain a financial advantage by deception) you are convicted and fined $3000, together with a CCO for three years commencing today with 600 hours of unpaid community work.

84 On Charge 2 (obtaining a financial advantage by deception) you are convicted and fined $6000, together with a CCO for three years commencing today with 600 hours of unpaid community work.

85 The total fine is $9000 and will be referred to Fines Victoria for management and collection. The CCOs will run concurrently. So that is a total of three years with 600 hours of unpaid community work.

86 Pursuant to s 6AAA of the *Sentencing Act 1991* I state that the sentence I would have imposed on you but for your pleas of guilty is a total effective sentence of 18 month's imprisonment with a non-parole period of 9 months.

87

[25]Ibid 338 [131] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).
[26]Ibid s 43.
[27]Ibid s 5(4).